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### DECOSTER III: NEW ISSUES IN INEFFECTIVE ASSISTANCE OF COUNSEL

During the mid and late 1960s, claims of ineffective assistance of counsel in criminal trials increased significantly.<sup>1</sup> Commentators viewed the body of law surrounding this new litigation as unsettled or transitional.<sup>2</sup> Uneasiness resulted from seemingly inconsistent formulations of standards by which to judge these numerous claims.<sup>3</sup> *United States v. Decoster*<sup>4</sup> (*Decoster II*) seemed to offer a resolution and some guidance in the late 1970s. The case was seen as a "turning point in judicial analysis" because it established a set of specific duties as the standard for determining effectiveness and treated these duties as constitutional requirements.<sup>5</sup>

This view of *Decoster II* was premature, for a contemporary review of the ineffective assistance of counsel problem reveals substantial reliance by the other federal appellate courts on the United States Supreme Court's less specific articulation of the standard required of counsel. Moreover, the area of focus of attention has shifted to the allocation of burdens of proof in these claims and to what extent the prosecution should have recourse to the harmless error doctrine. The District of Columbia Circuit's decision in *Decoster III*, which overruled and superseded *Decoster II*, epitomizes this shift in judicial inquiry. *Decoster III* is, for the time being, the authoritative case in these new problem areas. Nevertheless, the suggestions made in *Decoster III* must be tested against the general constitutional framework established by the Supreme Court for effective assistance of counsel.

<sup>1</sup> Strazella, *Effective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 443 (1977). This comment examines the constitutional implications of the right to effective assistance of counsel. For a discussion of the civil liability of court-appointed counsel, see Comment, *Liability of Government-Appointed Attorneys in State Tort Actions*, 71 J. CRIM. L. & C. 136 (1980).

<sup>2</sup> *Id.* See also Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 111 (1977).

<sup>3</sup> See, e.g., Strazella, *supra* note 1, at 446.

<sup>4</sup> No. 72-1283 (D.C. Cir. Oct. 19, 1976) (opinion following remand) [hereinafter cited as *Decoster II*], *reheard en banc*, No. 72-1283 (D.C. Cir. July 10, 1979) [hereinafter cited as *Decoster III*], *cert. denied*, 100 S. Ct. 302 (1979).

<sup>5</sup> Comment, *The Constitutional Mandate of Effective Assistance of Counsel: The Duty to Investigate*, 6 HOFSTRA L. REV. 245 (1977).

#### I. THE CONSTITUTIONAL SOURCES OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Claims for appellate relief for ineffective assistance of counsel can be brought under either the fifth<sup>6</sup> or sixth<sup>7</sup> amendments. The earliest claim regarding the performance of counsel was brought under the due process clause of the fifth and fourteenth amendments. In *Powell v. Alabama*<sup>8</sup> the Supreme Court held that a defendant's rights included an "effective" appointment of counsel.

Prior to the 1960s, lower courts followed the Supreme Court and held that the due process clause guaranteed the right to effective assistance of counsel.<sup>9</sup> The District of Columbia Circuit Court of Appeals developed the "farce and mockery" test to determine whether this right had been vio-

<sup>6</sup> U.S. CONST. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

<sup>7</sup> U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall have the assistance of counsel for his defense."

<sup>8</sup> 287 U.S. 45 (1932). *Powell* involved the appointment of the entire Scottsboro, Alabama, bar as counsel for the "Scottsboro Boys." Until trial no specific appointments had been made, and none of the lawyers undertook an investigation of the case. The Supreme Court reversed the defendants' rape convictions and held that the fifth amendment required counsel to provide "effective aid in the preparation and trial of the case." *Id.* at 71.

<sup>9</sup> *Bottiglio v. United States*, 431 F.2d 930, 931 (1st Cir. 1970) ("a mockery, a sham, or a farce"); *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir. 1967) ("farce and a mockery of justice, shocking to the conscience of the Court"); *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965) ("farce, or a mockery of justice"); *Bouchard v. United States*, 344 F.2d 872, 874 (9th Cir. 1965) (quoting *Reid v. United States*, 334 F.2d 915, 919 (9th Cir. 1964)) ("farce or a mockery of justice"); *Root v. Cunningham*, 344 F.2d 1, 3 (4th Cir.), *cert. denied*, 382 U.S. 866 (1965) ("so transparently inadequate as to make a farce of the trial"); *Frاند v. United States*, 301 F.2d 102, 103 (10th Cir. 1962) ("trial becomes mockery and farce"); *O'Malley v. United States*, 285 F.2d 733, 734 (6th Cir. 1961) ("farce and a mockery of justice, shocking to the conscience of the Court"); *Darcy v. Handy*, 203 F.2d 407, 427 (3rd Cir.), *cert. denied*, 346 U.S. 865 (1953) ("farce and a mockery of justice"); *United States v. Wright*, 176 F.2d 376, 379 (2d Cir.), *cert. denied*, 338 U.S. 950 (1949) ("shock the conscience of the Court and make the proceedings a farce and mockery of justice"); *Feely v. Ragen*, 166 F.2d 976, 980 (7th Cir. 1948) ("travesty of justice").

lated.<sup>10</sup> This test permitted reversal of the conviction only when counsel's substandard performance rendered the trial a farce and a mockery of justice shocking to the conscience of the court.<sup>11</sup> The policy behind the farce and mockery test was not so much the protection of the defendant as the preservation of the systemic integrity of the trial.<sup>12</sup> Some courts continue to adhere to this test.<sup>13</sup>

The farce and mockery test imposes a heavy burden on a defendant seeking appellate or collateral review because he must present evidence of shocking and outrageous conduct by his counsel.<sup>14</sup> For example, in *Jones v. Huff*<sup>15</sup> a convicted forger alleged that counsel failed to object to the admission of evidence of a coerced confession, failed to call witnesses who allegedly would have established the innocence of the accused, and most importantly, failed to comply with the jury's request for a sample of the defendant's handwriting to compare with the purported forgery. The court held that such allegations, if proven, would constitute a farce and a mockery of justice because counsel had failed to represent the accused in any fundamental respect.<sup>16</sup>

In cases where the quality of representation exceeds that provided in *Jones*, the farce and mockery test is of limited use. Postconviction tactical decisions or the choice of a particular defense theory fall outside the scope of the test because neither amounts to a total failure of representation.<sup>17</sup> A generally high level of representation blemished only by counsel's inadvertent remark that he was appointed by the court and had a duty to defend a guilty client will not constitute a farce or mockery of justice.<sup>18</sup> In general, single incidents will not support a claim of ineffective counsel because the farce and mockery test is not primarily designed to protect the individual defendant or further the

truth-seeking function of trials. Rather, this test gauges the impact of the attorney's behavior on the trial process. The contemporary expansion of the right to counsel and the effective assistance of counsel has been accomplished through the sixth amendment.<sup>19</sup> This approach, in contrast to the due process analysis, personalized the right to effective assistance of counsel by assuring the defendant of access to and meaningful help from counsel.

Three situations may give rise to sixth amendment violations. The first is where the defendant is without counsel.<sup>20</sup> The requirement that counsel be appointed for indigent defendants originally applied only to those charged with federal felonies.<sup>21</sup> *Gideon v. Wainwright*<sup>22</sup> incorporated the sixth amendment into the fourteenth, expanding its coverage to state felony prosecutions. Subsequent decisions extended the requirement to all misdemeanor prosecutions involving potential incarceration.<sup>23</sup> In such cases, relief is available to defendants who are clearly guilty. They need not show that the deprivation of counsel prejudiced the defendant.<sup>24</sup> Moreover, the prosecution cannot claim that the absence of counsel was merely harmless error because the presence of counsel is fundamental to the fairness of the trial.<sup>25</sup>

The second situation infringing on the right to effective assistance of counsel occurs where counsel is present physically but his effectiveness is impaired by judicial or statutory barriers to the exercise of his tactical or strategic judgment. Such impairment also may result from court practices which intrude on the attorney-client relationship.<sup>26</sup>

<sup>19</sup> Strazella, *supra* note 1, at 444-45.

<sup>20</sup> *Analytically*, a defendant could be without counsel where a state has denied counsel from appearing on behalf of the defendant, which is quite unlikely since a statute forbidding the retention of counsel would violate the sixth amendment on its face. *Practically*, a defendant would be without counsel only when unable to pay for one, i.e., indigent.

<sup>21</sup> Johnson v. Zerbst, 304 U.S. 458 (1938); see Decoster III, No. 72-1283, slip op. at 6 (D.C. Cir. July 10, 1979) (Leventhal, J.).

<sup>22</sup> 372 U.S. 335 (1963).

<sup>23</sup> Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).

<sup>24</sup> Chapman v. California, 386 U.S. 18, 43 (1967) (Stewart, J., concurring).

<sup>25</sup> Decoster III, slip op. at 6 (Leventhal, J.).

<sup>26</sup> See Geders v. United States, 425 U.S. 80 (1976) (trial court order prohibited consultation between counsel and defendant during overnight recess); Herring v. New York, 422 U.S. 853 (1973) (statute gave judge in nonjury trial power to prohibit counsel's closing argument); Brooks v. Tennessee, 406 U.S. 605 (1972) (statute restricted counsel's discretion on whether to put defendant on the stand);

<sup>10</sup> Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945).

<sup>11</sup> United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971).

<sup>12</sup> Jones v. Huff, 152 F.2d 14; Diggs v. Welch, 148 F.2d 667.

<sup>13</sup> See United States v. Brown, 600 F.2d 248, 257-58 (10th Cir. 1979); United States v. Budar, 567 F.2d 192, 201-02 (2d Cir.), cert. denied, 434 U.S. 872 (1977); Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir.), cert. denied, 434 U.S. 845 (1977); Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977).

<sup>14</sup> Diggs v. Welch, 148 F.2d at 669.

<sup>15</sup> 152 F.2d 14.

<sup>16</sup> *Id.* at 15.

<sup>17</sup> Gillihan v. Rodriguez, 551 F.2d 1182; Rickenbacker v. Warden, 550 F.2d 62.

<sup>18</sup> Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974).

The defendant need not show actual prejudice as a result of this sixth amendment violation.<sup>27</sup> A presumption of prejudice arises because the government, by statute or court order, has shaped the adversary process to its own (i.e., the prosecution's) advantage by these practices. Still, because this type of violation is not as egregious as the total deprivation of counsel, the conviction will not be reversed automatically if the prosecution can show that the resulting prejudice to the defendant, the constitutional error, was harmless beyond a reasonable doubt.<sup>28</sup> In other words, constitutional violation must be inconsequential compared to the overwhelming evidence of guilt.<sup>29</sup>

Finally, the sixth amendment may be implicated where, after counsel has been appointed and there has been no subsequent interference with his activities, counsel allegedly renders aid of low quality and value. The Supreme Court has held that a violation of the sixth amendment occurs when counsel's performance is not "within the range of competence demanded of attorneys in criminal cases."<sup>30</sup>

In *Tollett v. Henderson*,<sup>31</sup> the Supreme Court reviewed a black defendant's habeas corpus petition. Twenty-five years earlier defendant Henderson had pled guilty to murder in exchange for a reduction of his sentence from death to imprisonment for ninety-nine years. In 1973, Henderson attacked the validity of the guilty plea, alleging that it was not "made intelligently and voluntarily with the advice of competent counsel."<sup>32</sup> The respondent argued that his appointed counsel's advice and representation were incompetent because he failed to question Tennessee's practice of excluding blacks from grand juries. The Court held that for Henderson to prevail he had to demonstrate not only the unconstitutionality of the grand jury system, but also that counsel's advice to plead guilty without questioning the composition of the grand jury

was outside the normal range of competence of Tennessee attorneys in 1948.<sup>33</sup> The standard for determining an attorney's competence is therefore geographically and temporally relative.

The disposition of *Tollett v. Henderson* can be contrasted with the outright rejection of an ineffective assistance claim in *United States v. Agurs*.<sup>34</sup> In *Agurs*, the Court briefly dismissed the defendant's argument that counsel's failure to request the criminal record of a murder victim so harmed the self-defense theory of the defendant as to constitute reversible error. Although such conduct seems below the normal level of competence of the time and place, *Agurs* can be reconciled with *Tollett* because in the former case the defendant based his claim on the fifth amendment instead of the sixth amendment. As discussed above,<sup>35</sup> fifth amendment claims regarding the assistance of counsel are to be measured against the farce and mockery test. The facts alleged in *Agurs* simply failed to constitute a substantial outrage upon the integrity of the adversary system.

The indication that the sixth amendment requires a standard different from the farce and mockery test raises questions regarding the exact content of a sixth amendment standard, the allocation of the burden of proof as to prejudice, and the possible application of the harmless error doctrine. The federal appellate courts have given various responses to each of these questions.

First, sixth amendment standards seem to vary. Some courts have followed the general outlines of Supreme Court decisions and have developed a negligence standard. For example, the Third Circuit holds defense counsel to "the exercise of the customary skill and knowledge which normally prevails at the time and place."<sup>36</sup> Similarly, the Eighth Circuit requires the "customary skill and diligence that a reasonable attorney would perform under similar circumstances."<sup>37</sup> Related to these standards is the Seventh Circuit's requirement that

Ferguson v. Georgia, 365 U.S. 570 (1961) (statute permitted defendant to make an unsworn statement but barred counsel from eliciting same testimony on direct examination).

<sup>27</sup> Decoster III, slip op. at 7 (Leventhal, J.).

<sup>28</sup> Chapman v. California, 386 U.S. at 22-24.

<sup>29</sup> See Harrington v. California, 395 U.S. 250, 254 (1969) (violation is harmless error when overwhelming evidence supports the verdict after offending evidence has been subtracted).

<sup>30</sup> Tollett v. Henderson, 411 U.S. 258, 264 (1973) (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).

<sup>31</sup> 411 U.S. 258.

<sup>32</sup> Id. at 265.

<sup>33</sup> Id. at 269. The Court quoted a concurring judge of the Tennessee Court of Criminal Appeals: "No lawyer in this state would have ever thought of objecting to the fact that Negroes did not serve on the grand jury in 1948."

<sup>34</sup> 427 U.S. 97 (1976). It seems odd that in such a contemporary case the petitioner would rely on the fifth amendment for his ineffective assistance of counsel claim.

<sup>35</sup> See text accompanying note 9 *supra*.

<sup>36</sup> Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

<sup>37</sup> United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1970). For an analysis of *Easter*, see Recent Trend, *The Changing Federal Standard for Judging Ineffectiveness of Counsel*, 68 J. CRIM. L. & C. 412 (1977).

the representation meet the "minimum professional standard"<sup>38</sup> and that of the Ninth Circuit which mandates a "reasonably competent attorney acting as a diligent, conscientious advocate."<sup>39</sup> All of these formulations use a "reasonable attorney" as the measuring stick.

In practice most applications of the negligence standard relate to situations involving the filing of motions and the making of timely objections. Thus, in *Cooper v. Fitzharris*,<sup>40</sup> the court held that a violation of the sixth amendment occurs when counsel fails to move to suppress evidence taken in an illegal search, fails to object to evidence as it is introduced, and fails to stipulate a client's former conviction to avoid the introduction of damaging proof of the conviction. Sometimes more egregious failures are involved. For example, the Third Circuit granted an evidentiary hearing where defendant alleged that counsel had failed to undertake any investigation and to prepare adequately for trial.<sup>41</sup>

The Fifth Circuit developed a slightly different standard, which the Sixth Circuit has since adopted. These courts require representation by "counsel reasonably likely to render and rendering reasonably effective assistance."<sup>42</sup> The Fifth Circuit later indicated that the proper scope of the inquiry to determine whether the standard has been met must turn on an examination of the totality of the circumstances at trial.<sup>43</sup> This statement is subject to several interpretations. It may mean that pretrial preparation and investigation, as well as trial conduct are covered by the standard.

Perhaps in practice this standard is no broader than the negligence standard. In *Nero v. Blackburn*,<sup>44</sup>

the Fifth Circuit applied its standard and upheld a collateral attack based on ineffectiveness of counsel. The court reversed the conviction and granted a new trial because defense counsel, who was unfamiliar with criminal procedure, failed to object to prejudicial statements in the prosecutor's closing argument. Under the Louisiana Criminal Code, the objection would have been sustained and an automatic mistrial would have resulted. The Fifth Circuit rejected the argument that the failure to ask for an automatic mistrial was a tactical decision by holding that a tactical decision is ineffective unless it is an informed decision. Since a "reasonable criminal attorney" would be knowledgeable about criminal procedure, there is no practical difference between the Fifth Circuit standard as applied in *Nero* and the negligence standard of the other circuits.

A third alternative standard is one that formalizes the negligence standard by defining the "reasonable criminal attorney" in terms of a set of specific duties. The Fourth Circuit requires an attorney to confer with the client, advise him of his rights and alternative defenses, and to investigate all relevant matters.<sup>45</sup> Subsequently, the Fourth Circuit held that counsel must make more than a perfunctory effort to fulfill his duties.<sup>46</sup> The District of Columbia Circuit adopted this checklist approach in *Decoster I*.<sup>47</sup>

Supporters of the checklist approach view it as more meaningful than the vague negligence approach because it provides appointed counsel with notice of what is expected.<sup>48</sup> They also claim that it guarantees indigent defendants a substantial minimum level of representation.<sup>49</sup> Nevertheless, whether this imposition of affirmative duties is reconcilable with the noncategorical, open-ended approach taken by the Supreme Court is subject to question. Defenders of the checklist approach argue that the checklist merely lists the attributes of the "reasonable attorney" that are common to all times and places.<sup>50</sup> The Fourth Circuit apparently sees no conflict between the checklist approach and the Supreme Court guidelines since it

<sup>38</sup> *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975).

<sup>39</sup> *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978). The First Circuit also has adopted a reasonableness test, *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978).

<sup>40</sup> 568 F.2d 1325 (9th Cir. 1978). See also *United States v. Easter*, 539 F.2d 663 (ineffective assistance of counsel claim based on failure to file a motion to suppress evidence obtained in an illegal search and seizure and on failure to object when the tainted evidence was introduced at trial).

<sup>41</sup> *Moore v. United States*, 432 F.2d 730.

<sup>42</sup> *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960) (emphasis in original); cf. *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) (sixth amendment requires "counsel reasonably likely to render and rendering reasonably effective assistance").

<sup>43</sup> *United States v. Gray*, 565 F.2d 881, 887 (5th Cir. 1977).

<sup>44</sup> 597 F.2d 991 (5th Cir. 1979).

<sup>45</sup> *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968).

<sup>46</sup> *Jackson v. Cox*, 435 F.2d 1089, 1093 (4th Cir. 1970).

<sup>47</sup> See text accompanying notes 73-76 *infra*.

<sup>48</sup> Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752, 781 (1980).

<sup>49</sup> See Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973). See also Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 836-38 (1976), for an example of such a checklist.

<sup>50</sup> Tague, *supra* note 2, at 125-27.

has adopted the latter without overruling its earlier decision applying the checklist standard.<sup>51</sup>

Perhaps the two approaches are not totally inconsistent, but they do express different, if not opposing, attitudes toward the amount of judicial supervision and review of counsel needed to satisfy the sixth amendment. The negligence approach assumes that the profession will police itself sufficiently so that judicial intervention only will be warranted for the exceptional case. The checklist approach belies a skepticism about such self-regulation and argues for accountability to the bench.

Most of the litigation in this area concerned attempts to shift the circuits from the old "farce and mockery" test to the new sixth amendment standard. Courts have paid considerably less attention to what comes after a showing of the breach of the standard. Assuming that courts settle on one type of standard of conduct, they still must determine the relevance of prejudice to the defendant's case resulting from a violation of the standard, allocate the burden of proof, and determine the applicability of the harmless error doctrine. The Sixth Circuit has held that a presumption of prejudice arises from all sixth amendment violations that cannot be rebutted by a harmless error argument.<sup>52</sup> In effect, the Sixth Circuit has taken the questionable step of rejecting any distinction between the triad of sixth amendment violations, even though the Supreme Court continues to adhere to such distinctions.<sup>53</sup>

The Eighth Circuit employs a different approach by holding that when the performance of counsel has fallen below the required standard "the seriousness of the constitutional violation must be judged in terms of the particular factual circumstances of that case."<sup>54</sup> Unlike the Sixth Circuit, the Eighth Circuit distinguishes an ineffective assistance case from cases where counsel has not been appointed, or where counsel's representation has been impaired by government action. Thus, the Eighth Circuit indicated that in most cases it was prepared to require the defendant to demonstrate some prejudice to his case. Also, the court would not automatically place the burden of showing a

lack of prejudice on the prosecution as the beneficiary of the error.<sup>55</sup> The Eighth Circuit attempted to develop a flexible approach that would shift the burden of proof by presuming prejudice only where circumstances such as lapse of time or death or disappearance of witnesses made the defendant's inability to prove prejudice consequential. The Eighth Circuit then would permit the prosecution to use harmless error analysis as a means of rebutting the presumption that prejudice amounting to constitutional error has occurred.<sup>56</sup>

The Ninth Circuit requires the defendant to demonstrate that the "serious derelictions" of counsel had resulted in actual prejudice to the defense.<sup>57</sup> This court, like the Eighth Circuit, distinguished effective assistance from government impairment of the right to counsel. Only the latter is inherently prejudicial under the sixth amendment. Because the Ninth Circuit held that ineffective assistance was not inherently prejudicial, the defendant must show actual prejudice to establish reversible constitutional error.<sup>58</sup> Finally, the court permitted the prosecution to demonstrate that the error was harmless.

The Supreme Court has not addressed several possible solutions to these problems. The various solutions found in *Decoster III* now will be examined in detail. Analysis will locate the *Decoster* opinions in the sixth amendment triad constructed here and will test them against the demands of that framework.

## II. THE DECOSTER CASE

Long before the *Decoster* litigation, the District of Columbia Circuit employed the "farce and mockery" test when evaluating ineffective assistance claims. Subsequently, the circuit made a tentative, hesitant shift to a sixth amendment analysis of the ineffectiveness problem in *Bruce v. United States*.<sup>59</sup> *Decoster I* carried this analysis to an examination of the content of the sixth amendment standard.<sup>60</sup> *Decoster III* goes beyond this and ex-

<sup>51</sup> *Id.* at 218-19.

<sup>52</sup> *Id.*

<sup>53</sup> *Cooper v. Fitzharris*, 568 F.2d at 1330.

<sup>54</sup> *Jones v. Huff*, 152 F.2d 14; *See Diggs v. Welch*, 148 F.2d 667.

<sup>55</sup> 379 F.2d 113 (D.C. Cir. 1967).

<sup>60</sup> The first two phases of the *Decoster* case have been heavily noted and commented upon in the literature. What follows is a synopsis of the first two decisions. For more background, see Strazella, *supra* note 1; Tague, *supra* note 2; Comment, *supra* note 5; Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927 (1973). The procedural and factual history of the case is taken, for the most part, from the plurality opinion.

<sup>51</sup> *Marzullo v. Maryland*, 561 F.2d 540, 543-44 (4th Cir. 1974) ("range of competence demanded of attorneys in criminal cases"). Cf. *Tollett v. Henderson*, 411 U.S. at 264 ("range of competence demanded of attorneys in criminal cases").

<sup>52</sup> *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974).

<sup>53</sup> See text accompanying notes 17, 23 & 26 *supra*.

<sup>54</sup> *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974).

amines in detail the allocation of the burden of proof and the applicability of the harmless error rule. The *Decoster* litigation parallels the development of the law in the area of effective assistance of counsel.<sup>61</sup>

A word is necessary to clarify the procedural history of the *Decoster* litigation. *Decoster I* was a direct criminal appeal which resulted in a reversal of the conviction with a remand for an evidentiary hearing to determine the effectiveness of the trial attorney. The government prevailed at the evidentiary hearing, but again lost on appeal in *Decoster II* before the same panel that heard *Decoster I*.<sup>62</sup> The government's petition for rehearing *en banc* was granted and the conviction was finally upheld because the additional judges outnumbered and outvoted the former panel majority.<sup>63</sup>

#### A. DECOSTER I

On May 29, 1970, three men assaulted Roger Crump, a soldier, at the corner of 8th and K Streets, N.W., near the parking lot of the Golden Gate Bar in Washington, D.C. They held Crump from behind, threatened him with a razor, and took his wallet with \$100 in cash.<sup>64</sup>

Two plainclothes police officers cruising the area in an unmarked car saw the robbery in progress and gave chase to the assailants on foot. Crump and one of the policemen, Officer Box, chased one of the suspects into the lobby of the D.C. Annex Hotel, where Box arrested him. The man was Willie Decoster, and Crump immediately identified him as one of his assailants. Neither the money nor the wallet was recovered.<sup>65</sup>

The defendant was declared indigent, and counsel was appointed. Decoster could not make a \$5000 bond and was jailed.<sup>66</sup> During this time he wrote letters to counsel and Judge Waddy in which he admitted he had fought with Crump on May 29.<sup>67</sup> At trial Decoster claimed he met Crump at the Golden Gate Bar but had returned to the hotel

<sup>61</sup> *Cooper v. Fitzharris*, 586 F.2d 1325, also discusses the issues of prejudice and harmless error.

<sup>62</sup> See Section II, B *infra*.

<sup>63</sup> See Section II, C *infra*.

<sup>64</sup> Decoster III, slip op. at 3 (Leventhal, J.).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 32.

<sup>67</sup> Decoster's testimony contradicted this fact. *Id.* at 3-4. The text of both letters is found in the concurring opinion of Judge MacKinnon, *Id.* at 36 n.39. They are reproduced without correction below.

Letter to defense counsel written between May and November, 1970 (no precise date is known):

200 19th St. S.E.  
Wash., D.C.

alone. Yet Eley, one of the codefendants, testified that he had seen Decoster fighting in the parking lot. Crump's eyesight had been impaired in an accident after the assault, and he could not identify Decoster at the trial. He testified that he was sure of his identification that night in the hotel lobby.<sup>68</sup>

The jury found Decoster guilty of aiding and abetting an armed robbery. Decoster received a sentence of two-to-eight years<sup>69</sup> and at sentencing made statements acknowledging his involvement in criminal activities and admitting the substance of his letter to Judge Waddy.<sup>70</sup>

On appeal to the District of Columbia Circuit, the majority raised the issue of ineffective assistance of counsel *sua sponte*.<sup>71</sup> Chief Judge Bazelon, writing for the majority, remanded the case for an evidentiary hearing to examine the effectiveness of the

Dear Sir:

As I tried to call you before, but couldn't make contact, I decided to write again. Its important I see you, as you are my lawyer and I don't have ways of fighting my case without you. To get to the point, I want to file assault charges against my accuse victim. I think I have as much right as he has, at least I'm entitle to it. If they can charge me with robbery while fighting, I think I have as much right as him and can do the same. As for Elley & Taylor my accuse partners they can testify their role. Elley came to my aide when the victim stuck his hand in his pocket & Taylor was just standing on the sidewalk. I hope you can do something about this as soon as you get this letter. Please let me know something. If he can be free so can I.

Willie Decoster

Dorm D.C D.C 162743

Letter to the trial court of November 4, 1970:

Honorable Judge Waddy,

I am an inmate of D.C. Jail who has been incarcerated for five month on a charge that has been change from robbery to arm robbery. The motive for this letter is to request from the court another lawyer. . . . Being an individual of limited education its only natural for me to protect my innocence and with the transcript from my hearing which I cannot obtain because of illegal counseling. *I can prove that I am only guilty of assault by self defence. . . .*

<sup>68</sup> *Id.* at 3-4 (Leventhal, J.).

<sup>69</sup> *Id.* at 4.

<sup>70</sup> Decoster III, *Id.* at 38 n.41 (MacKinnon, J., concurring). At sentencing Decoster told the court:

I just wanted the Court to know that I was sincere in writing this letter. I feel like I can be—well, I know I can be rehabilitated which I have did on my part in having to come to face the facts. It just seems like, you know—well, really, I left home when I was at an early age and I didn't have that much confidence and I just hooked up in the wrong places and in the wrong ways.

<sup>71</sup> *United States v. Decoster*, 487 F.2d 1197 (D.C. Cir. 1973) [hereinafter cited as *Decoster II*].

trial attorney. Specifically, the majority directed the trial court to investigate the trial attorney's amount of preparation, his decision to call Eley to the stand, and his decision not to interview the hostile witnesses and the codefendants.<sup>72</sup>

The trial court was instructed to compare the trial attorney's representation of the defendant with "the reasonably competent assistance of an attorney as his diligent conscientious advocate."<sup>73</sup> To give content to this standard, the court adopted the checklist approach of specifically required duties; duties inspired by the American Bar Association's Standards for the Defense Function.<sup>74</sup> The duties imposed by the court were:

- (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. . . .
- (2) Counsel should promptly advise his client of his rights and take all actions to preserve them. . . .
- (3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . And, of course, the duty to investigate also requires adequate legal research.<sup>75</sup>

The majority further held that if the trial attorney had violated these duties, the defendant was entitled to a reversal unless the prosecution could show an absence of prejudice from the violations.<sup>76</sup>

Judge MacKinnon concurred with the majority's articulation of the standard for effectiveness of counsel but dissented from the allocation of the burden of proving prejudice.<sup>77</sup> He argued that since the defendant has access to information pertaining to the claim, it is incumbent upon him to demonstrate that the violation resulted in actual prejudice.<sup>78</sup>

The effect of the *Decoster I* holding was two-fold. First, the decision unanimously established the sixth amendment as the standard for ineffective assistance claims. Second, the decision adopted the

<sup>72</sup> *Id.* at 1202.

<sup>73</sup> *Id.*

<sup>74</sup> AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION (1974) [hereinafter ABA STANDARDS].

<sup>75</sup> *Decoster I*, 487 F.2d at 1203-04.

<sup>76</sup> *Id.* at 1204. A similar set of duties was required by the Fourth Circuit in *Coles v. Payton*, 389 F.2d at 226. In a later case, Chief Judge Bazelon argued that the *Decoster* checklist was a codification of existing law. *United States v. Clayborne*, 509 F.2d 473, 488 (D.C. Cir. 1974) (Bazelon, C.J., dissenting).

<sup>77</sup> *Decoster I*, 487 F.2d at 1205 (MacKinnon, J., concurring in part and dissenting in part).

<sup>78</sup> *Id.*

checklist method for formulating a sixth amendment standard of effectiveness. The court disagreed over the importance of a showing of actual prejudice under the checklist approach. This issue would become crucial in subsequent litigation of the case.

A motion for a new trial was filed on November 1, 1973. In February, 1974, a three-day evidentiary hearing was held before Judge Waddy.<sup>79</sup> The evidentiary hearing left unanswered questions that went to the heart of the ineffective assistance of counsel claim. The only witness called by the government was the trial attorney who could remember little detail of the trial three years earlier. The attorney testified that there was little reason to conduct anything more than a perfunctory investigation in light of what the trial attorney thought was an admission of guilt coupled with overwhelming evidence unfavorable to Decoster. Decoster took the stand, but failed to explain the inconsistencies between his letters and his trial testimony. Also, Decoster could produce no names of uncalled witnesses who would support his claim that he was in the hotel lobby at the time of the assault on Crump.<sup>80</sup>

The appellate counsel was at a loss to show how, even with the minimal defense established by trial counsel, the defendant was prejudiced by his attorney's performance. The appellate counsel's argument hinged on the fact that the answers to so many questions concerning the quality of Decoster's representation were left unanswered that prejudice must be presumed unless the government could demonstrate a lack of prejudice.<sup>81</sup> Judge Waddy rejected this argument and denied the motion for a new trial.<sup>82</sup>

#### B. DECOSTER II

Decoster appealed Judge Waddy's denial of his motion for a new trial. The court of appeals reversed Decoster's conviction with Judge MacKinnon again dissenting.<sup>83</sup> Chief Judge Bazelon, again writing for the majority, held that counsel's failure to conduct a full legal and factual investigation substantially deviated from the duty to investigate as adapted from the ABA standards.<sup>84</sup> Chief Judge Bazelon then addressed the possibility

<sup>79</sup> See account of unreported evidentiary hearing in Tague, *supra* note 2, at 119-21.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> The motion was denied on April 23, 1975. *Decoster III*, slip op. at 5 (Leventhal, J.).

<sup>83</sup> *Decoster II*, No. 72-1283 (D.C. Cir. Oct. 19, 1976).

<sup>84</sup> *Id.*, slip op. at 16-19.



of prejudice and held that where evidence of prejudice was unavailable, the court would presume that prejudice resulted.<sup>85</sup> This result had the practical effect of discharging the defendant's burden without the necessity of a judicial reexamination of the actual effect of the trial attorney's actions.

The presumption of prejudice shifted the burden to the government to show beyond a reasonable doubt that there was in fact no constitutional error.<sup>86</sup> Because of the absence of witnesses or evidence going to the issue of a possible alibi and because of the faulty memories of the participants in the original trial, the government could not meet its burden on the available facts, and accordingly the court reversed.<sup>87</sup>

Judge MacKinnon again dissented. He argued that the majority, in its zeal to develop its analysis of the standard and allocation of the burden of proof, had failed to consider the guilt of the defendant. After reviewing the findings of the evidentiary hearings, Judge MacKinnon concluded that Decoster was guilty as charged and that the trial attorney, upon learning this for himself, was relieved of performing an investigation.<sup>88</sup>

Judge MacKinnon saw difficulties with transforming the advisory ABA standards into affirmative duties. He reasoned that the majority was insensitive to the discretion that must be afforded to defense counsel. He accused the court of substituting, several years after the fact, its judgment of trial strategy for that of a competent, if unenthusiastic, trial attorney.<sup>89</sup>

Judge MacKinnon objected most to the majority's use of the presumption of prejudice to meet the defendant's burden of proof. Judge MacKinnon argued that the defendant should have to prove actual prejudice to his defense by the actions of trial counsel to overturn his conviction.<sup>90</sup> Actual prejudice was related to the existence of evidence that would tend to raise a reasonable doubt of guilt. Judge MacKinnon argued that the burden therefore had to rest on the defendant, because only he was in a position to have access to the relevant persons and information.<sup>91</sup>

### C. DECOSTER III

On March 17, 1977, the District of Columbia Circuit granted the government's motion for re-

hearing *en banc* and vacated the *Decoster II* panel decision. Although Decoster's conviction was affirmed, the court was severely divided.<sup>92</sup>

### *Judge Leventhal's Plurality Opinion*

The plurality opinion, written by Judge Leventhal, followed the Supreme Court in distinguishing between cases where state statutes impaired the effectiveness of counsel and those where the sixth amendment violation resulted from the low quality of counsel's representation.<sup>93</sup> For the former cases, the plurality accepted the applicability of a *per se* rule precluding the use of harmless error analysis; but for the latter, it interpreted the Supreme Court decisions as requiring a noncategorical, factual approach.<sup>94</sup>

From decisions in other lower courts and in its own circuit, the plurality abstracted a two-step approach that combined the standard of performance with the allocation of the burden of proof:

The claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers. And the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial. Once the appellant has made this initial showing, the burden passes to the Government, and the conviction cannot survive unless the Government demonstrates that it is not tainted by the deficiency, and that in fact no prejudice resulted.<sup>95</sup>

The plurality then examined the case at hand. Judge Leventhal said that defense counsel has an affirmative duty to investigate possible defenses, although the scope of the duty varies from case to case. In short, the reviewing court can only appraise the scope and possible effect of investigation "in light of the information available to the attorney."<sup>96</sup> While noting that counsel might have interviewed several potential witnesses, such as the bartender at the Golden Gate Bar or the desk clerk

<sup>92</sup> There was no opinion for the court. Instead, the majority vote for affirmance was obtained by a combination of a plurality consisting of Judges Leventhal, McGowan, Tamm, and Wilkey, and a concurring bloc of Judges MacKinnon, Tamm, and Robb. Judge Robinson concurred only in the result. He joined in a statement filed by Chief Judge Wright for himself and Judge Bazelon. Judge Bazelon also filed his own dissent which was joined by Wright. Judge Bazelon, who remained on the court, was replaced as Chief Judge by Wright. The combined opinions total 225 pages in the original slip opinion.

<sup>93</sup> See notes 17, 23, & 26 and accompanying text *supra*.

<sup>94</sup> Decoster III, slip op. at 5-13 (Leventhal, J.).

<sup>95</sup> *Id.* at 21.

<sup>96</sup> *Id.* at 24.

<sup>85</sup> *Id.* at 20-22.

<sup>86</sup> *Id.* at 23-24.

<sup>87</sup> *Id.* at 25.

<sup>88</sup> *Id.* at 41 (MacKinnon, J., dissenting).

<sup>89</sup> *Id.* at 23.

<sup>90</sup> *Id.* at 50.

<sup>91</sup> *Id.* at 52.

at the D.C. Annex Hotel, the plurality found nothing in the record to indicate that their testimony would have helped the defense.<sup>97</sup> In addition, the plurality criticized the trial attorney's failure to interview Eley until moments before trial, but held that the defendant had not shown any prejudice from this error.<sup>98</sup>

*Judge MacKinnon's Concurring Opinion*

In a concurrence joined by Judges Tamm and Robb, Judge MacKinnon reiterated many of the points he had advanced in his two earlier dissents, devoting most of his opinion to the burden of proof issue. Again, Judge MacKinnon would require the defendant to show more than the possible outcome effect mandated by the plurality. The defendant must show "that he was prejudiced by his counsel's inadequacy"<sup>99</sup> before the burden shifts to the government for a harmless error argument:

If the defendant makes the requisite *prima facie* showing of a substantial violation of the constitutional duty owed him by counsel that resulted in substantial unfair prejudice to his defense, the burden of proceeding shifts to the Government. Then the Government has a right to show, for example, that the alleged witnesses did not exist or could not be located, or that counsel was given no indication that such witnesses did exist, or that the testimony of the witnesses was irrelevant or otherwise deficient.

<sup>97</sup> Decoster claimed that his representation was ineffective because of the following:

- (1) Counsel was dilatory in seeking a bond review while appellant was incarcerated for almost five months following his arrest on May 29, 1970;
- (2) Counsel failed to obtain a transcript of appellant's preliminary hearing and failed to employ that transcript to impeach prosecution witnesses at trial;
- (3) Counsel failed to interview any potential witnesses at trial;
- (4) Counsel announced "ready" for trial at a time when he did not know whether or not he would present any alibi witnesses and before he had fully developed his defense;
- (5) Counsel offered to waive jury trial and to permit appellant to be tried before the court when the court had heard a part of the evidence in connection with the guilty pleas of the two codefendants;
- (6) Counsel failed to make an opening statement; and
- (7) Counsel failed to see that appellant's sentence was properly executed, in that he failed to see that appellant was given credit for time served.

*Id.* at 27 n.85.

<sup>98</sup> *Id.* at 29-31.

<sup>99</sup> *Id.* at 11 (MacKinnon, J., concurring) (emphasis deleted).

If despite the Government's effort to rebut the evidence presented by the defendant, the defendant eventually carries his burden—he demonstrates that a substantial violation of a duty owed him by counsel resulted in substantial unfair prejudice to his defense—then a constitutional violation has occurred.<sup>100</sup>

Judge MacKinnon again emphasized the reliability of the verdict as the controlling consideration. He reviewed the record of the evidentiary hearing more exhaustively than had Judge Leventhal and concluded that an investigation by the trial attorney would have discovered nothing significantly helpful to Decoster.<sup>101</sup>

In a dissent joined by Judge Bazelon, Chief Judge Wright noted that the two dissenters agreed with Judge Robinson, who had concurred in the result, on two "fundamental principles." First, *Decoster I* had established the standard of performance for counsel; second, where a defendant demonstrates that counsel failed to meet the standard "the defendant has been denied his constitutional right to counsel and his conviction must be reversed unless the Government proves beyond a reasonable doubt that the ineffective assistance of counsel was harmless."<sup>102</sup>

The dissenting opinion largely restated the panel majority decisions in *Decoster I* and *Decoster II*. The dissenters saw the key issue of the case as a manifestation of the general indifference of society to the needs and problems of the poor.<sup>103</sup> The dissent urged the majority to take notice of the inadequacy of legal services provided by court-appointed attorneys and to take a decisive step to solve the problem.<sup>104</sup>

The dissenters saw three elements in an ineffective legal assistance claim:

- 1) Did counsel violate one of the articulated duties?
- 2) Was the violation "substantial"?
- 3) Has the Government established that no prejudice resulted?<sup>105</sup>

The dissenters regarded the standards mandated in *Decoster I* as minimum requirements applicable to all criminal defense cases. Judge Bazelon contended that the evidentiary hearing showed that the trial attorney, in addition to his failure to investigate, had neglected to confer with Decoster at regular intervals for reasonable lengths of time.<sup>106</sup> On the whole, the dissent characterized the

<sup>100</sup> *Id.* at 34-35.

<sup>101</sup> *Id.* at 38-39, 51.

<sup>102</sup> *Id.* at 1 (Wright, C.J., dissenting).

<sup>103</sup> *Id.* at 1 (Bazelon, J., dissenting).

<sup>104</sup> *Id.* at 2 n.3.

<sup>105</sup> *Id.* at 26.

<sup>106</sup> *Id.* at 36.

trial attorney's preparation as so "perfunctory" and superficial as to amount to a clear violation of the duties he owed to the defendant.<sup>107</sup>

The dissent next examined the substantiality of the violations. Judge Bazelon argued that the existence of violations triggered further inquiry into their frequency and pervasiveness and into whether the departure from the checklist standard was justified or excused.<sup>108</sup> He found the trial attorney's behavior from appointment to execution of sentence to be one of continuous carelessness.<sup>109</sup>

On the issue of prejudice, the dissent argued that automatic reversal of the conviction was required unless the government could prove beyond a reasonable doubt that the constitutional error was harmless.<sup>110</sup> The dissent found that in the evidentiary hearing the government had failed to show that the "gross omissions" of the trial attorney were without consequence.<sup>111</sup>

### *Judge Robinson's Opinion*

While he agreed with the dissent's statement of the applicable law, Judge Robinson concurred in the result.<sup>112</sup> But unlike the dissent, he found that the government had carried its burden of proof on the prejudice issue.<sup>113</sup> Judge Robinson concluded that no amount of prejudice from ineffective counsel could outweigh the number of prosecution witnesses and their consistent testimony identifying Decoster as one of Crump's assailants.<sup>114</sup> He could conceive of nothing that Decoster could offer to overcome the "direct and positive proof" mustered by the government's eyewitnesses.<sup>115</sup>

### *Analysis of Decoster III*

In *Decoster III* the District of Columbia Circuit unanimously agreed that the demands of the sixth amendment only could be met by replacing the old "farce and mockery" rule with a reasonable attorney standard. The reasonable attorney standard, however, is subject to a wide variety of interpretations. The standard can be open-ended,

as Judge Leventhal and Judge MacKinnon would have it,<sup>116</sup> or it can consist of a list of specific duties as Judge Bazelon urges.<sup>117</sup> Further debate must consider the Supreme Court's activity in the area.<sup>118</sup> Still, several directions are possible on the issues of prejudice and harmless error.

Assuming a consensus on a uniform standard of conduct and a demonstration of a violation of that standard, a court may (1) require the defendant to show actual prejudice to his defense because of the violation; (2) require the defendant to demonstrate that the violation resulted in likely prejudice; or (3) presume that prejudice has resulted. These alternatives lead to a harmless error analysis if the defendant meets his burden, but the directions are analytically distinct.

Judge MacKinnon argued in favor of the first approach: requiring the defendant to prove actual prejudice.<sup>119</sup> This standard reflects an exacting interpretation of the elements necessary for a sixth amendment claim of ineffective assistance of counsel. The actual prejudice test eliminates the possibility of manipulation by a result-oriented court because the court must identify some tangible factor that damaged the effectiveness of the defense: the friendly witness not interviewed, the motion unfiled, the persuasive defense unargued. Also, the prosecution's harmless error argument will be more focused under the actual prejudice test because it will address the effect of a special prejudicial incident in the trial as a whole.

The second alternative, the likely-prejudice rule, suffers from vagueness that creates difficulties of implementation. The nature of the defendant's burden is uncertain. Presumably, the rule means that the mere possibility of prejudice is not enough; the defendant must present clear and convincing evidence of prejudice.<sup>120</sup> Unfortunately Judge Leventhal, who advocated this rule,<sup>121</sup> did not clarify the meaning of likelihood.

The third alternative is to grant the defendant a presumption of prejudice. Several possible forms of presumption could be used, such as a rebuttable presumption for all violations, an irrebuttable presumption for certain egregious circumstances, or a presumption limited to certain fact situations.

<sup>107</sup> *Id.* at 34.

<sup>108</sup> *Id.* at 41.

<sup>109</sup> *Id.* at 42.

<sup>110</sup> *Id.* at 60-61. This argument is particularly disturbing when read in light of the dissent's earlier statement that "[i]t is no secret that in most criminal prosecutions the defendant is in fact guilty." *Id.* at 52.

<sup>111</sup> *Id.* at 60.

<sup>112</sup> See note 92 *supra*.

<sup>113</sup> *Id.* at 39-40 (Robinson, J., concurring in the result).

<sup>114</sup> *Id.* at 40 n.156.

<sup>115</sup> *Id.*

<sup>116</sup> See text accompanying notes 93-95 *supra*.

<sup>117</sup> See text accompanying note 110 *supra*.

<sup>118</sup> See text accompanying note 32 *supra*.

<sup>119</sup> See text accompanying notes 99 & 100 *supra*.

<sup>120</sup> It seems Judge Leventhal would require more than a mere preponderance of the evidence by his choice of the term "likely."

<sup>121</sup> See text accompanying note 95 *supra*.

Judge Bazelon followed his opinion in *Decoster II* and argued that a presumption of prejudice resulting from an attorney's violation arises only where the absence of essential facts make impossible a determination of whether the defendant has been prejudiced. Nevertheless, some of the language of the *Decoster III* dissent is quite expansive in light of the likelihood of prejudice and the small chance that the prosecution will be able to show harmless error.<sup>122</sup> This follows from Judge Bazelon's rejection of the distinction between state interference with the right to effective counsel and a claim based on the incompetency of counsel. If this distinction is illusory, it would seem that the dictum of *Chapman v. California*<sup>123</sup> to the effect that the right to counsel is never subject to a harmless error inquiry would apply to all ineffective counsel cases. However, Judge Bazelon himself rejects this result.

The differences in legal theory between Judge MacKinnon and Judge Bazelon are at times subsidiary to their differences in social philosophy. Judge Bazelon and Chief Judge Wright sought to formulate a rule applicable to ineffective counsel situations in order to compensate for the general indifference of society to the needs and problems of the poor.<sup>124</sup> These dissenters spent some time considering how to establish and implement minimum standards of effectiveness. One of their most controversial suggestions would enable the trial judge to require counsel to submit a checklist of pretrial preparation before the judge would permit the case to go forward.<sup>125</sup> In response to criticism that such a close supervisory role for the court would drastically alter the adversary system, the dissenters asserted that, given the chronically low quality of appointed counsel, such supervision was necessary to repair a system that "was already in shreds."<sup>126</sup>

<sup>122</sup> "It may be that the prejudice to the defendant from the denial of effective assistance of counsel is so great, and the likelihood that the government can prove lack of prejudice so small, that reversal should be required whenever a substantial violation of counsel's duties is shown. . . . (I) It may be that only a rule requiring automatic reversal can provide the deterrent effect necessary to insure that all defendants—innocent or guilty—receive the effective assistance of counsel." Slip op. at 66 (Bazelon, J., dissenting) (footnote omitted).

<sup>123</sup> 386 U.S. at 23 n.8. The Court cited *Gideon v. Wainwright*, 372 U.S. 335, in the footnote as an example of a situation where harmless error does not apply. For a brief discussion of *Gideon*, see text accompanying note 21 *supra*.

<sup>124</sup> *Decoster III*, slip op. at 70, (Bazelon, J., dissenting).

<sup>125</sup> *Id.* at 73.

<sup>126</sup> *Id.* at 74-75 (emphasis deleted).

Disagreeing with the Bazelon-Wright position, Judge MacKinnon contended that the "philosophy of the dissent"<sup>127</sup> had led to an "injudicial appeal to sympathy" for the poor:

The dissent plays the theme from *Griffin v. Illinois*, "[t]hat there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." But there is nothing in the record to indicate that *Decoster's* poverty caused him to commit robbery or prevented him from receiving a fair trial. Increased billions have been spent in recent years to alleviate poverty, but during this period all forms of crime have soared. . . . [The dissent's] myopic view of justice overlooks justice for the public, and for that far larger number of poor Americans who are the victims of crime.<sup>128</sup>

While Judge MacKinnon admitted that the dissenters' goals were "aspirational," he contended that the judiciary alone could not realistically implement such goals.<sup>129</sup>

Amidst the legal and political arguments of the court still existed Willie *Decoster's* essential claim that he was denied the effective assistance of counsel. The facts evidence some support for this contention. The trial attorney did not expend substantial effort in representing his client. Since he had to rely on his memory at the evidentiary hearing, he apparently kept no detailed files of the case. This fact alone demonstrates a lack of preparation and dedication. Nevertheless, the uncertainty surrounding the actions of *Decoster's* attorney makes a comparison between his actual defense and that which a reasonable attorney would have pursued problematic.

Yet even assuming that the trial attorney's conduct fell below the reasonable attorney standard, one must ask what effect this had on the outcome of the case. A court will not grant relief to a defendant denied effective assistance of counsel unless the defendant can show prejudice to his cause.<sup>130</sup> Since *Decoster* could not point to anything a more competent attorney could have done to render more effective assistance in his case, he did not demonstrate prejudice. *Decoster* could not substantiate his alibi defense, since he knew neither the names nor the whereabouts of any witnesses who could testify that he was some place other than at the scene of the crime. In contrast, the government produced eyewitnesses who never lost

<sup>127</sup> *Id.* at 47 (MacKinnon, J., concurring).

<sup>128</sup> *Id.* at 58-59.

<sup>129</sup> *Decoster III*, slip op. at 41-42 (Leventhal, J.).

<sup>130</sup> See text accompanying notes 53-57 *supra*.

sight of the fleeing Decoster from the time the crime was committed until he was arrested and identified by Crump. Taken together with Decoster's statements in his letters, this evidence provides a rational basis for the jury's verdict.

### III. CONCLUSION:

#### WHAT RULE SHOULD BE ADOPTED AND HOW SHOULD IT BE APPLIED?

##### A. THE STANDARD OF CONDUCT

The *Decoster* case demonstrates that, although members of the judiciary agree that the sixth amendment requires some standard of conduct by counsel, they cannot agree upon the content and articulation of that standard. However, a careful review of judicial arguments reveals a workable standard for effective assistance of counsel.

The Supreme Court has indicated that the standard for judging counsel's assistance consists of the "range of competence demanded of attorneys in criminal cases."<sup>131</sup> Although some commentators argue that this broad directive must be given more detailed "content,"<sup>132</sup> it seems that the Court intended to enunciate a generally applicable standard. The Supreme Court could have pronounced a categorical standard, listing specific duties for appointed counsel. Instead, the Court chose to recognize a range of permissive conduct for counsel in similar factual situations as determined by the practice of his locality at the time he provided representation.<sup>133</sup> Thus, the attempt to define a specific code of defense counsel behavior by the *Decoster III* dissenters is inconsistent with the Supreme Court guidelines.

The Supreme Court rejected the checklist approach for persuasive reasons. Most important, the imposition of specific duties on defense counsel and the continuing supervision of counsel's representation by the state would improperly interfere with the adversary process. Any enforcement of checklist duties would be accomplished by the trial court or, worse, the prosecution. Such a transfer of the defense initiative to the trial court evokes, as Judge Leventhal stated, the inquisitorial system of jurisprudence prevailing in Europe.<sup>134</sup> Such a fundamental restructuring of the American criminal justice system only should be undertaken by the legislature. In the meantime, just as pro-prosecution

intervention may violate the sixth amendment,<sup>135</sup> so also may close judicial supervision of the defense imbalance the adversary system.

Secondly, a mechanical application of a set of minimum standards to the performance of counsel may fail to consider the nuances, hunches, and forgotten circumstances that led counsel to undertake a particular course of action. Moreover, Judge Bazelon's selection of the ABA standards as the minimum level of conduct contravenes the drafters' intent that the standards be only advisory.<sup>136</sup> Judge MacKinnon feared that the use of supposedly advisory guidelines quickly will become rigid rules embodying the exclusive consideration of the issue.<sup>137</sup> Specified rules of conduct are unworkable because claims of ineffective assistance of counsel are inseparable from the factual situations from which they arise. While the unprincipled, *ad hoc* review of counsel's performance, such as the farce and mockery test, is insufficient, the alternate approach of a categorical checklist approach is not appropriate to the various factual settings of ineffectiveness of counsel claims.

Finally, minimum guidelines cannot effectively encompass all questionable instances of counsel's behavior. Commentators sympathetic to the idea of utilizing guidelines have pointed to many situations which the ABA standards do not cover. These situations include instances in which counsel withholds information from the client,<sup>138</sup> undertakes no investigation because counsel, based upon experience with similar cases, believes investigation to be of little value,<sup>139</sup> or fears that an investigation will only uncover material damaging to the client.<sup>140</sup>

##### B. PREJUDICE, THE BURDEN OF PROOF, AND HARMLESS ERROR

Unlike the standard of conduct, the Supreme Court has not explicitly allocated the burden of

<sup>135</sup> See note 23 and accompanying text *supra*.

<sup>136</sup> The ABA disclaimed any attempt to create a constitutional standard for ineffective assistance of counsel:

These standards are intended as guides for conduct of lawyers and as the basis for disciplinary action, not as criteria for judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation of the effectiveness of counsel, depending upon all the circumstances.

ABA STANDARDS § 1.1(f) at 154.

<sup>137</sup> *Decoster III*, slip op. at 14 n.15 (MacKinnon, J., concurring).

<sup>138</sup> Tague, *supra* note 2, at 132.

<sup>139</sup> *Id.* at 133.

<sup>140</sup> *Id.* at 134.

<sup>131</sup> *Tollett v. Henderson*, 411 U.S. at 264 (quoting *McMann v. Richardson*, 397 U.S. at 770-71).

<sup>132</sup> E.g., Note, *supra* note 48, at 781.

<sup>133</sup> See note 33 *supra*.

<sup>134</sup> *Decoster III*, slip op. at 40 (Leventhal, J.).

proof as to prejudice nor applied the harmless error doctrine to ineffective assistance of counsel cases. Of all of the alternatives discussed in *Decoster III*,<sup>141</sup> that forwarded by Judge MacKinnon is the best: a violation of the standard must result in actual prejudice to constitute constitutional error, and the prosecution must be afforded an opportunity to demonstrate that the error was harmless.<sup>142</sup> A review of the sixth amendment precedents demonstrates the strength of this view.

In cases where no counsel has been provided or where the state has impaired counsel's performance, claims of sixth amendment violations do not require a showing of prejudice since these situations are inherently prejudicial.<sup>143</sup> In contrast to these situations of inherent prejudice, the ineffective assistance of counsel due to lack of diligence or preparation may be prejudicial only in certain circumstances. Since the ineffective assistance of counsel claim does not arise through the fault or impediment of the state, it is a less egregious violation of the sixth amendment than the prosecution's impairment of counsel's effort or the court's failure to appoint counsel at all.<sup>144</sup> More importantly, ineffective assistance of counsel claims require a different analysis by reviewing courts than the other sixth amendment cases. In most sixth amendment cases, the reviewing court is presented with an objective problem: either counsel was appointed and allowed to confer with his client or not. The basis of the claim of ineffective assistance, however, requires a more detailed and difficult examination of counsel's efforts and abilities in a specific factual situation. This necessarily amorphous inquiry into counsel's effectiveness calls for demonstration of actual prejudice to the defendant in order to provide relief only in warranted circumstances.

Postconviction relief is warranted where the defendant is arguably innocent.<sup>145</sup> Ineffective assistance of counsel claims satisfy this precondition because the defendant must demonstrate actual

prejudice to his defense. When a defendant can establish prejudice, he can contend that counsel's derelictions injured his case, thereby undermining the reliability of the verdict. It is reasonable to require the defendant to challenge the verdict's reliability since the party who has access to information relevant to the disposition of issues in litigation should carry the burden of proof on those issues.<sup>146</sup> Only the defendant is in a position to know which facts his counsel failed to utilize. Placing the burden on the defendant to demonstrate both derelictions of counsel and the prejudice of such derelictions is as necessary as it is fair.

It is also fair to allow the prosecution to demonstrate that counsel's ineffective assistance was harmless. Just as the demonstration of prejudice indicates that the defendant is arguably innocent, the harmless error rule permits the prosecution to rebut this innocence by showing that the prosecution's inculcating evidence outweighs any exculpating effect which the proper assistance of counsel might have had on the outcome of the case.<sup>147</sup> Should the prosecution meet this burden, relief must be denied to the defendant.

In sum, the Supreme Court has stated that the standard of performance applicable in ineffective assistance of counsel cases must be that of a reasonable attorney. The Supreme Court has not answered the central question raised by more recent litigation such as *Decoster* as to how the burden of proof in these cases is to be allocated or whether the harmless error doctrine is applicable. Judge MacKinnon is correct in arguing that the defendant has the burden of demonstrating that a violation of the standard of attorney conduct occurred and that the violation resulted in actual prejudice to his case. The prosecution should also be afforded the opportunity to demonstrate that the violation was harmless. The reasons for placing this requirement on the defendant are the seriousness of the constitutional error alleged, the predication of post-conviction relief on arguable innocence, and the traditional notions of allocation of burdens of proof. Admittedly this formulation of the rule places a burden on the defendant that is greater than some would say is appropriate.<sup>148</sup> But when

<sup>141</sup> See text accompanying notes 94-110 *supra*.

<sup>142</sup> See note 41 and accompanying text *supra*.

<sup>143</sup> See notes 23 & 24 and accompanying text *supra*.

<sup>144</sup> The other two sixth amendment claims are non-appointment of counsel and government impairment of counsel. See text accompanying notes 20 & 26 *supra*.

<sup>145</sup> See *United States v. Agurs*, 427 U.S. 97, 112 (1976) ("overriding concern" is the "justice of the finding of guilt"). Cf. *Hankerson v. North Carolina*, 432 U.S. 233, 239 (1977) (the purpose of the burden of proof is "to prevent the erroneous conviction of innocent persons"); *Stone v. Powell*, 428 U.S. 465, 490 (1976) ("[T]he ultimate question of guilt or innocence . . . should be the central concern of a criminal proceeding.").

<sup>146</sup> See *Decoster III*, slip op. at 23-25 (MacKinnon, J., concurring).

<sup>147</sup> See note 29 and accompanying text *supra*.

<sup>148</sup> Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, *supra* note 48, argues that the imposition of a proof-of-prejudice requirement upon the defendant is unfair and unjustified. The note suggests a "comprehen-

the equities are balanced it does not seem unfair to burden those beneficiaries of government largess who subsequently complain about the quality of what they receive. A lighter burden for the defend-

ant would elevate the most intangible and unreviewable of claims beyond the criminal justice system's overriding concern with guilt and innocence.

ARTHUR J. ROTATORI

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sive approach" to the problem of ineffective assistance of counsel. This approach would employ appellate court guidelines such as those set out by Judge Bazelon's *DeCoster III* dissent and relieve the defendant of the necessity to prove prejudice by placing the entire burden of proof on the government, judicial "monitoring" of counsel's pre-trial preparation, and expanded financial and support resources for the criminal defense bar. *Id.* at 781. The note argues that a checklist approach is necessary to guarantee effective assistance of counsel and that such a standard would be "eviscerated" by requiring the defendant to prove prejudice. *Id.*

The note criticizes the Leventhal approach of requiring the defendant to demonstrate likely prejudice because

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it permits a defendant to "go to jail even when all concede that his counsel substantially failed to represent him." *Id.* at 768. Yet this is only the case where the defendant could not demonstrate that the failures of counsel did not result in prejudice to him and, therefore, the guilty verdict remains valid. The error that the note makes is in not accepting the possibility of inconsequential, nonprejudicial violations of the standard of effective assistance. Thus, the imposition of a proof-of-prejudice requirement upon the defendant is necessary to ensure that appellate relief is granted only in appropriate cases and is not, as the author of the note maintains, an impediment constructed merely to make proving allegations of ineffective assistance of counsel more difficult.